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Sup. Ct.

TRANSCRIPT OF RECORD

(Pages 1 to 70)

Supreme Court of the United States

OCTOBER TERM, 1946

47

No. 3466

SILESIAN AMERICAN CORPORATION, DEBTOR,
AND SILESIAN HOLDING COMPANY, PETI-
TIONERS,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AS SUC-
CESSOR TO THE ALIEN PROPERTY CUSTO-
DIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1946.

CERTIORARI GRANTED FEBRUARY 17, 1947.

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United States Circuit Court of Appeals 1
FOR THE SECOND CIRCUIT

IN THE MATTER

of

SILESIAN-AMERICAN CORPORATION,

Debtor.

Statement Under Rule 13

The Debtor commenced this proceeding by filing its petition for reorganization under Chapter X of the Bankruptcy Act on July 29th, 1941. The name of the original party was Silesian-American Corporation, Debtor.

By order of the District Court for the Southern District of New York dated July 30th, 1941, Francis X. Conway and E. O. Sowerwine, were appointed trustee and additional trustee of the Debtor respectively.

The Securities and Exchange Commission appeared herein, through notice of appearance filed by its attorney, on August 1st, 1941. 3

By order of the United States District Court for the Southern District of New York dated August 8th, 1941 the Guaranty Trust Company of New York as indenture trustee of the Debtor's outstanding bonds, was designated as a person to receive notice of all matters arising in this proceeding.

By order of the United States District Court for the Southern District of New York dated August 11th, 1941, Silesian Holding Company, as holder of more than a

Statement Under Rule 13

majority of the outstanding shares of the Debtor, was designated as a person to receive notice of all matters arising in this proceeding.

By undated order of the United States District Court for the Southern District of New York, entered October 1st, 1942, Max Winkler, Felix M. Lopez and Edward W. Smith, as a Bondholders' Protective Committee were designated as persons to receive notice of all matters arising in this proceeding.

- 5 On April 3rd, 1945 the Alien Property Custodian appeared herein by the United States District Attorney for the Southern District of New York.

No formal notice of appearance has been filed nor motion to intervene made on behalf of Union Bank of Switzerland, La Roche & Co., Banque Cantonale de Berne, and Aktiengesellschaft Leu & Co. (the several of whom are frequently referred to as the "Swiss Banks"), but Leon Finley, Esq., as attorney for the said banks, was served with a copy of the order to show cause on which the order appealed from was entered, and Mr. Finley appeared on behalf of the said Swiss Banks at the argument of the motion and filed papers in respect thereto, and the Court recognized such appearances.

- 6 The order appealed from, dated October 30th, 1945, and entered October 31st, 1945, was made by Hon. John W. Clancy as the result of a motion by the Debtor for instructions, which motion was brought on by an order to show cause dated April 5th, 1943, and after numerous adjournments came on for hearing June 26th, 1945.

Notices of appeal were filed November 3rd, 1945, by the Debtor and also by the Silesian Holding Company.

Order to Show Cause for Instructions
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

✓ SILESIAN-AMERICAN CORPORATION,

Debtor.

In Proceedings for the Reorganization of a Corporation.
No. 79,205.

Upon the annexed petition of Silesian-American Corporation, the above-named Debtor, verified the 31 day of March, 1943, and sufficient reason appearing to me therefor; it is

ORDERED that Francis X. Conway, as Trustee; E. O. Sowerwine, as additional Trustee; Silesian Holding Company; Securities & Exchange Commission; Max Winkler, Felix M. Lopez and Edward W. Smith, as Bondholders Protective Committee; Leon Finley, as Attorney for Union Bank of Switzerland, La Roche & Company, Banque Cantonale de Berne and Aktiengesellschaft Leu & Company; Leo T. Crowley, Alien Property Custodian; the Tax Commission of the State of New York; Guaranty Trust Company of New York, as Indenture Trustee and as Transfer Agent for the Debtor; and the Bank of the Manhattan Company, as Registrar of the Debtor's securities, show cause before me in Room 506, United States Courthouse, Foley Square, New York City, New York, on the 12th day of May, 1943, at 10:30 o'clock in the forenoon of the day, or as soon thereafter as counsel can be heard, why this

Order to Show Cause for Instructions

- 10 Court should not judicially determine the effect of the demand of the Alien Property Custodian, dated February 12, 1943, that the Debtor cancel on its books the outstanding certificates for fifty thousand shares of its Preferred Stock, of the par value of \$100.00 per share, and ninety-eight thousand shares of its Common Stock without par value, referred to in Vesting Order No. 370, and issue in lieu thereof new certificates in the name of the Alien Property Custodian, and why the Court should not issue its instructions to the Debtor with respect thereto, and why this
- 11 Court should not grant such other, further and different relief as is just and proper; and it is

- FURTHER ORDERED that service of a copy of this Order and the Petition upon which it is made upon Goldwater & Flynn, Attorneys for Francis X. Conway, as Trustee, and E. O. Sowerwine, as additional Trustee of Silesian-American Corporation, Debtor; upon Davis, Polk, Wardwell, Gardiner & Reed, as Attorneys for Guaranty Trust Company of New York, as Indenture Trustee; upon Chadbourne, Wallace, Parké & Whiteside, as Attorneys for Silesian Holding Company; upon J. Anthony Panneck, as Attorney for Securities & Exchange Commission; upon
- 12 Messrs. Schribner & Miller, as Attorneys for the Bondholders Protective Committee; upon Leon Finley, as Attorney for Stockholders and Creditors; upon Leo T. Crowley, Alien Property Custodian; upon the Tax Commission of the State of New York; and upon the Bank of the Manhattan Company, and the Guaranty Trust Company of New York, as Registrar and Transfer Agent, respectively, of the Debtor's securities, on or before the 12 day of April, 1943, shall be deemed as good and sufficient service hereof.

Dated New York, N. Y., 5 day of April, 1943.

(sgd) JOHN W. CLANCY,
U. S. D. J.

Petition in Support of Order to Show Cause**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

In Proceedings for the Reorganization of a Corporation.**No. 79,205.**

*To the Hon. John W. Clancy, Judge of the District Court
of the United States for the Southern District of New
York:*

The petition of Silesian-American Corporation, the
Debtor, respectfully shows as follows:

1. Your petitioner is the Debtor in this proceeding for reorganization under Chapter X of the Bankruptcy Act. Francis X. Conway, Esq. and E. O. Sowerwine have been duly appointed, respectively as Trustee and as additional Trustee for the purposes specified in Section 189 of the Bankruptcy Act, and have duly qualified and are acting as such.

2. The capital stock of the Debtor consists of 120,000 shares of 7% Cumulative Preferred Stock of the par value of \$100.00 each, in the aggregate par value of \$12,000,000, all of which is issued and outstanding, and 200,000 shares of Common Stock without par value, but having a stated value of \$1,000,000, all of which is issued and outstanding.

3. Fifty-one per cent of the Common stock and fifty-eight and one-third per cent of the Preferred Stock of the Debtor is held by Silesian Holding Company, a Delaware

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Petition in Support of Order to Show Cause

Corporation. The remaining stock of the Debtor (forty-nine per cent of its Common Stock, and forty-one and two-thirds per cent of its Preferred Stock) is owned, according to the Debtor's books and records, by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland (hereinafter referred to as the "Non Ferrum Company").

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4. Said Non Ferrum Company is a Swiss Corporation which appears on the "Proclaimed List of Certain Blocked Nationals Promulgated Pursuant to Proclamation No. 2497 of the President of the United States of July 17, 1941, Revision 1, February 7, 1942," and it has been found by the Alien Property Custodian that said shares of stock of the Debtor are held by said Non Ferrum Company for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben—a German corporation—and that said shares are property of, and represent an interest in, a business enterprise which is a national of a designated enemy country (Germany).

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5. On or about January 18, 1943, there was served upon the Debtor a copy of Vesting Order No. 370, reciting that it vested in Leo T. Crowley, Esq., the Alien Property Custodian, all of said fifty thousand shares of Preferred Stock, and ninety-eight thousand shares of Common Stock of the Debtor, as appears more fully from a copy of said Vesting Order annexed hereto, marked Exhibit "A", and hereby made a part hereof.

6. Upon information and belief, said Vesting Order No. 370 was issued by the Alien Property Custodian pursuant to the terms and provisions of the First War Powers Act, 1941 (50 U. S. C., §616) amending subdivision (b) of

Petition in Support of Order to Show Cause

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Section 5 of the Trading with the Enemy Act of October 6, 1917.

7. Upon information and belief, the certificates of the Debtor for said shares of stock are not in the physical possession of said Leo T. Crowley, Alien Property Custodian, but were, prior to the making of said Vesting Order No. 370, and many years prior to August 31, 1939, pledged with the following named banks in Switzerland, hereinafter referred to as the "Swiss Banks," as collateral security for loans made by them aggregating several millions of dollars, the exact amount being unknown to the debtor: 20

Union Bank of Switzerland
LaRoche & Company
Banque Cantonale de Berne
Aktiengesellschaft Leu & Company

8. The exact nature and extent of the property rights and interest of said Swiss Banks in and to said shares of stock prior to the making of said Vesting Order No. 370, or subsequent thereto, is unknown to the Debtor, and the Debtor does not know whether said Swiss Banks have foreclosed their lien on said securities. 21

9. Said Swiss Banks do not appear on the said "Proclaimed List of Certain Blocked Nationals Promulgated Pursuant to Proclamation No. 2497 of the President of the United States of July 17, 1941, Revision 1, February 7, 1942," nor has any order been served on the Debtor by the Alien Property Custodian vesting, or purporting to vest, in the Alien Property Custodian any property rights or interest of said Swiss Banks in any of said shares of stock.

10. On or about February 12, 1943, the Alien Property Custodian demanded that the Debtor cancel on its books

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Petition in Support of Order to Show Cause

the outstanding certificates for said fifty thousand shares of Preferred Stock and Ninety-eight thousand shares of Common Stock, and issue in lieu thereof its certificates in the name of "Alien Property Custodian, Washington, D. C., Account No. 28-1722," as appears more fully from a copy of said demand annexed hereto, marked Exhibit "B", and hereby made a part hereof.

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11. Your petitioner is in doubt as to whether it should comply with said demand for the following reasons, among others:

(a) The First War Powers Act, 1941, provides, in part, that "any property or interest of any foreign country or national thereof shall vest . . .," as directed therein. There is no provision in the First War Powers Act, 1941, however, providing for the issuance to the Alien Property Custodian of certificates representing shares of stock which have been vested pursuant to the provisions above quoted of said First War Powers Act, 1941. Nor has there been any finding pursuant to said First War Powers Act pursuant to which any property rights of said Swiss Banks in said shares of stock could or would vest in the Alien Property Custodian.

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The Trading with the Enemy Act of 1917 contains a provision in Section 7(c) thereof as follows:

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its,

Petition in Support of Order to Show Cause

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his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.” 26

Section 7 of the Trading with the Enemy Act refers only to property owned either by “an enemy or ally of enemy.” It contains no reference to property owned by nationals of countries, such as Switzerland, which are not at war with the United States or are not allies of countries which are at war with the United States, and nationals of such countries are not included in the definitions of “enemy” and “ally of enemy” in Section 2 of the Trading with the Enemy Act of 1917.

There is doubt, therefore, as to the authority of the Alien Property Custodian to direct the issuance of such certificates, as is requested by said demand made upon the Debtor, Exhibit “B”, annexed hereto. 27

(b) Further, there is doubt as to the extent to which the Trading with the Enemy Act of 1917 is still in force and effect, and, more particularly, whether said Section 7(c) thereof is still in effect. Said Act contains numerous references to the 1917-1918 period, from which it may be argued that, by its terms, it applied only to that period. See for example, references to “the present war” in Sec-

Petition in Support of Order to Show Cause

tion 3(d) and Section 4(b). It contains similar provisions referring to the status in 1917 of property of enemies or allies of enemies. For example, Section 7, which is the section containing the above-quoted provision with respect to transfers of enemy-owned shares of stock, refers, in subparagraph (a) to shares of stock "owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy." The shares of stock here involved were not so owned in 1917, for the Debtor was not organized until 1926.

Recently, on February 12, 1943, Judge Bondy held, in *Draeger Shipping Co., Inc. v. Crowley*, 11 L. W. 2626-7, that by reason of the circumstance that Congress in the First War Powers Act, 1941, provided, by its express language, that it amends the first sentence of subdivision (b) of Section 5 of the Trading with the Enemy Act "It, therefore, must be assumed that Congress intended that all the provisions of the Trading with the Enemy Act of 1917 as amended shall be held applicable to this amendment *so far as this consistently can be done.*"

The Debtor, in making any transfer of said stock pursuant to the demand of the Alien Property Custodian, would be protected only (1) if Section 7 of said Act is in full force and effect, (2) if said subparagraph (c) thereof applies to transfers under the circumstances here presented, and (3) the demand of the Alien Property Custodian for such transfer is validly issued pursuant to the provisions thereof.

By reason of the facts above stated, the Debtor is in doubt as to whether these conditions have been met, and whether, therefore, it should comply with said demand because of the consequent risk of incurring liabilities therefor.

Petition in Support of Order to Show Cause

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(c) The Debtor's Registrar, The Bank of the Manhattan Company, and its stock Transfer Agent, the Guaranty Trust Company of New York, are both located within the State of New York, and any certificates issued pursuant to the demand of the Alien Property Custodian would be issued in New York. The tax law of the State of New York imposes a tax upon all stock transfers, and Section 270 thereof provides that "it shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the [tax] stamps and pay the tax provided by this article." The Alien Property Custodian, in his demand, Exhibit "B", makes no tender of cancelled tax stamps of the State of New York, and the tax law of the State of New York contains no provision exempting such transfers from taxation. The Debtor, and its said Registrar and Transfer Agent, are, therefore, in doubt as to the legality of any transfer made pursuant to such demand and as to their right to make such transfer without proof of due payment of the New York State stock transfer taxes thereon. 32

(d) The United States Internal Revenue Code, in 26 U. S. C., Sec. 1802(c), subdivision 7, purports to exempt from federal taxes, transfers or stock such as this proposed transfer, but contains an apparent error in its wording. The subdivision exempts from federal stock transfer tax, any transfer "from a foreign country or national thereof to the United States or any agency thereof . . . directed pursuant to the authority vested in the President by Section 5(b) of the Trading with the Enemy Act (40 Stat. 415) as amended by the First War Powers Act (55 Stat. 838)." The reference in the statute to 55 Stat. 838 apparently represents an 33

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Petition in Support of Order to Show Cause

erroneous attempt to refer to the First War Powers Act, although the reference actually is a reference to the Presidential Proclamation issued pursuant to the First War Powers Act.

35

12. For the reasons above stated, the Debtor respectfully requests that the Court issue its instructions to the Debtor as to whether, or upon what condition, the Debtor should comply with said demand, and determine the validity of said demand, and whether the Debtor would be protected from any and all claims by any parties, including said Swiss Banks, by reason of compliance with said demand.

13. The following have appeared in this proceeding:

Goldwater & Flynn, Attorneys for Francis X. Conway, as Trustee, and E. O. Sowerwine, as additional Trustee of Silesian-American Corporation, Debtor, 60 East 42nd Street, New York, N. Y.

Davis, Poik, Wardwell, Gardiner & Reed, Attorneys for Guaranty Trust Company of New York as Indenture Trustee, 15 Broad Street, New York, N. Y.

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Chadbourne, Wallace, Parke & Whiteside, Attorneys for Silesian Holding Company, 25 Broadway, New York, N. Y.

J. Anthony Pannuck, Attorney for Securities & Exchange Commission, 120 Broadway, New York, N. Y.

Schribner & Miller, Attorneys for Bondholders Protective Committee, 40 Wall Street, New York, N. Y.

14. Leon Finley, 521 Fifth Avenue, New York, N. Y., appears herein as "Attorney for stockholders and credi-

Petition in Support of Order to Show Cause

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tors," but has filed no formal notice of appearance. Upon information, and belief, said Leon Finley appears for, among others, the Swiss Banks above mentioned, and is, therefore, a person interested in this application, as is Leo T. Crowley, Alien Property Custodian, 120 Broadway, New York, N. Y., the Tax Commission of the State of New York, 80 Center Street, New York, N. Y., and the Bank of the Manhattan Company, 40 Wall Street, New York, N. Y., and Guaranty Trust Company of New York, 140 Broadway, New York, N. Y., the Debtor's Registrar and Transfer Agent, respectively. All of these, together with those who have appeared herein, should receive notice of this application. No other person has been designated to receive notice generally herein or with respect to this matter.

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15. No previous application has been made for the relief requested herein.

Wherefore, your petitioner, the Debtor, prays that an order issue herein directing the above-named to show cause why this Court should not determine the validity of said demand of the Alien Property Custodian that the Debtor issue said certificates, and instruct the Debtor with respect thereto, and why the Court should not grant such other, further and different relief as may be just and proper.

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SILESIAN-AMERICAN CORPORATION,
Debtor.

By (s) **ROBERT E. DWYER**

(s) **THOMAS A. McGRATH,**

Thomas A. McGrath,
Attorney for Debtor,
Office and Post Office Address,
25 Broadway, New York, N. Y.

(Verification by Robert E. Dwyer as Vice-President of Debtor, sworn to March 31, 1943.)

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Exhibit A to Petition**OFFICE OF ALIEN PROPERTY CUSTODIAN****WASHINGTON****VESTING ORDER NUMBER 370**

Re: 41.67% of the preferred stock and 49% of the common stock of Silesian-American Corporation

41 Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding that the property described as follows:

50,000 shares of 7% cumulative non-voting preferred stock and 98,000 shares of common stock (which constitute substantial parts, namely, 41.67% and 49%, respectively, of all outstanding shares of preferred and common stock) of Silesian-American Corporation, a Delaware corporation, New York, New York, which is a business enterprise within the United States, owned by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, and held for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben, a German corporation,

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is property of, and represents an interest in said business enterprise which is, a national of a designated enemy country (Germany), and determining that to the extent that any or all of such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of the aforesaid designated enemy country, and having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it neces-

Exhibit A to Petition

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sary in the national interest, hereby vests such property in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return should be made or such compensation should be paid.

44

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national", "designated enemy country" and "business enterprise within the United States" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

45

Executed at Washington, D. C. on November 17, 1942.

(Signed) LEO T. CROWLEY
LEO T. CROWLEY
Alien Property Custodian

(OFFICIAL SEAL)

CERTIFIED TO BE A TRUE
COPY OF THE ORIGINAL.

FRANCIS A. MAHONEY

FRANCIS A. MAHONEY, Secretary
OFFICE OF ALIEN PROPERTY CUSTODIAN

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Exhibit B to Petition**OFFICE OF****ALIEN PROPERTY CUSTODIAN
WASHINGTON****February 12, 1943**

**Silesian-American Corporation
25 Broadway
New York, New York**

Attention of Secretary47 **Gentlemen:**

Reference is made to Vesting Order No. 370 executed by the Alien Property Custodian on November 17, 1942 vesting in himself as Alien Property Custodian 50,000 shares of 7% cumulative non-voting preferred stock and 98,000 shares of common stock of Silesian-American Corporation owned by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, and held for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben.

48 A copy of Vesting Order No. 370 was served January 18, 1943 on Mr. E. O. Sowerwine, Secretary and Treasurer of your corporation by Mr. Francis J. Carmody, an authorized representative of the Alien Property Custodian.

You are hereby authorized and directed to cancel on the books of Silesian-American Corporation the outstanding certificates for 50,000 shares of 7% cumulative non-voting preferred stock and 98,000 shares of common stock, as above referred to, and issue in lieu thereof new certificates in the name of the "Alien Property Custodian, Washington, D. C., Account No. 28-1722."

Affidavit of Leon Finley, Sworn to July 20, 1945

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The new certificates are to be delivered against receipt to the Federal Reserve Bank of New York, Safe-keeping Department, for the account of the Alien Property Custodian.

Please report to this office the serial numbers of the cancelled certificates and the names in which they were inscribed. It is also requested that we be advised whether the cancelled certificates have been surrendered to the corporation for retirement or if they are still outstanding.

Kindly advise this office of your action in the matter.

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Very truly yours,

(sgd.) FRANCIS J. McNAMARA

FRANCIS J. McNAMARA
Assistant to the Alien Property Custodian

Affidavit of Leon Finley, Sworn to July 20, 1945

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

In proceedings for the reorganization of a Corporation.
No. 79,205.

STATE OF NEW YORK,

CITY AND COUNTY OF NEW YORK, } ss.:

LEON FINLEY, being duly sworn, deposes and says:

That he is an attorney at law, having his office at 521 Fifth Avenue, in the Borough of Manhattan, City of New York.

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Affidavit of Leon Finley, Sworn to July 20, 1945

That your deponent is the attorney for the Union Bank of Switzerland, La Roche & Co., Banque Cantonale de Berne, and Aktiengesellschaft Leu & Company, Swiss banking firms, having their offices in Switzerland.

That your deponent is advised and verily believes that his clients are the owners and holders of jointly and own and have the legal title to the 50,000 shares of the 7% cumulative non-voting preferred stock, and the 98,000 shares of the common stock of Silesian-American Corporation, which said shares represent 41.67% of the total issued non-voting preferred stock, and 49% of the total issued common stock of the Silesian-American Corporation.

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That the Alien Property Custodian did on November 17, 1942 issue vesting order No. 370 by the terms of which, he vested unto himself the said 41.67% of the preferred stock, and 49% of the common stock, which are in fact owned by your deponent's clients as hereinbefore named, and which are not owned as the Alien Property Custodian concluded in his vesting order by "Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle", for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben.

54

That your deponent is advised that both the preferred and common stock of Silesian-American Corporation, to wit, the 50,000 shares of the 7% cumulative non-voting preferred stock, and the 98,000 shares of the common stock, are owned by deponent's clients undisputably. That they have owned the said shares, and that they have been owned by them for many years before the outbreak of the war in Europe, as a result of their creditorship, and their having made large and substantial loans in the early 1930's, which said loans were secured by the said shares of both common and preferred stock; and that they have acquired and now own the said shares of stock for good and valuable consideration. That they have made claim to the said stock, and

Affidavit of Leon Finley, Sworn to July 30, 1945

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have at all times alleged that the said shares are owned by them bona fidedly, and not for the account of any third person, firm or corporation, direct and/or indirect; and that they and each of them jointly are the true owners of the same.

It is respectfully submitted that the vesting order as issued by the Alien Property Custodian was issued by him without any foundation in fact. There is no question in your deponent's mind from conversations had by your deponent, with the interested parties, and from the hearings that were had before the Treasury Department in 1941, but that the said shares are absolutely and entirely owned by Swiss nationals strictly and only.

56

In any event after Swiss assets were blocked in the United States, it was impossible for your deponent to communicate with his clients because of the fact that the German hordes occupied most of Europe, and there was no communication possible between the United States and Switzerland. Your deponent fully realized in 1942 that it was absolutely necessary and essential to have the physical documentary proof here in the United States in order to firmly and finally establish to the satisfaction of this Court, if needs be, and to the satisfaction of the Alien Property Custodian, if needs be, that there was no foundation for the Alien Property Custodian in issuing the vesting order. However, because of the impossibility of communications and the unavailability of the documents, your deponent advised the trustee in bankruptcy and the Alien Property Custodian personally that the Swiss claimed the title absolutely to the said 50,000 shares of preferred stock, and the 98,000 shares of the common stock notwithstanding the issuance of the vesting order.

57

In view of the adverse claims made of the Corporation by both the Swiss principals and the Alien Property Custodian, and further, because of the demand of the Alien

58

Affidavit of Leon Finley, Sworn to July 20, 1945

Property Custodian, dated February 12, 1943, that the Debtor Corporation (Silesian-American Corporation) cancel on its books the outstanding certificates for the 50,000 shares of the preferred stock, and the 98,000 shares of the common stock owned by the Swiss principals and referred to in Vesting Order No. 370, and to issue in lieu thereof new certificates in the name of the Alien Property Custodian, the Debtor did on April 5, 1943, make the present motion which was originally returnable on May 12, 1943, asking this Court for instructions as to what to do in view of the adverse claims.

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The said motion has been adjourned during the past two years by the Court on the consent of the interested parties, and at the request of either your deponent in behalf of his clients, and/or by the Trustee in bankruptcy, and/or by the Debtor Corporation. During the past few years, it has been impossible for your deponent because of the unavailability of communications with Switzerland to obtain from his clients the physical documentary proof necessary and required in order to firmly and finally and unequivocally establish that title to the said 50,000 shares of the preferred stock, and the 98,000 shares of the common stock of the Debtor corporation is purely and entirely Swiss owned, and to establish further that the Alien Property Custodian was in error in issuing his vesting order No. 370; that the same was issued without foundation in fact, and to prove beyond any doubt that the Swiss principals are the true bona fide and actual owners of the said 50,000 shares of the preferred stock, and the 98,000 shares of the common stock without any reversionary interest, equitable, legal or otherwise, direct and/or indirect, in any enemy national and/or in any other person, firm or corporation other than themselves, and to further establish that the said shares were acquired by the Swiss purely and entirely with Swiss capital and for their own account.

60

Affidavit of Leon Finley, Sworn to July 20, 1945

61

That limited communications were finally restored with Switzerland late in the year 1944. Your deponent did on December 4, 1944, write to the Union Bank of Switzerland and advise them of the then status of the proceedings, and requested that they forward to your deponent the documentary proof in order to establish title here. A copy of the said letter addressed to Alfred Schaefer, President of the Union Bank of Switzerland, is annexed hereto and made part hereof.

It did apparently take many months for the said letter to reach Switzerland, but it finally arrived. Not receiving any reply up to March, 1945, your deponent thereupon cabled to the Union Bank of Switzerland on March 6, 1945, advising them that your deponent had written on December 4, 1944 and requested absolute proof of title. A copy of the said cable is also annexed hereto and made part hereof. A reply was received on March 10, 1945 in which your deponent was advised that they had only then received deponent's letter of December 4, 1944, and further advised your deponent that the same shall be reverted to in due time.

62

Thereafter and on June 2, 1945, your deponent received a cable from La Roche & Co., one of the group of Swiss principals, in which your deponent was advised that the Swiss were in the course of preparing all the necessary documents, proofs and certifications required in order for your deponent to establish *title in the Swiss*, and that they were doing everything possible to get same into your deponent's hands at the earliest possible moment. A copy of the said cable of June 2, 1945, is also annexed hereto and made part hereof.

63

It is certainly reasonable to assume that a situation such as the one at bar is most complex; it involves many millions of dollars; the Swiss are a neutral people; the physical properties owned by the Silesian-American Corporation

64

Affidavit of Leon Finley, Sworn to July 20, 1945

are located in eastern Germany and Poland, and what policy will be adopted by the German and Polish governments towards foreign stockholders, is certainly not known at this time; and further, the Swiss as neutrals and non-belligerents are entitled to the full protection of the Court in every instance in order to protect their public rights in the pending proceeding before this Court.

It does not seem reasonable that the Swiss creditors, stockholders and principals would make a claim to title which is contrary to the truth.

65

It is therefore respectfully submitted that this Court should protect in every respect the interests and claims of the Swiss creditors in the proceeding before the Court, and should restrain the issuance of any new certificates to the Alien Property Custodian at this time. Further delay will not and cannot impede or damage any person and/or firm interested in the pending proceeding; and the Court should be jealous of the interests of and fully protect the trustees in the pending proceeding.

66

Your deponent in order to fully secure his clients' rights in the matter, did on May 18, 1945, write to Thomas A. McGrath, Esq., of 25 Broadway, New York City, Goldwater & Flynn, Esqs., Attention of Mr. Oliver Cowan, at 60 East 42nd Street, New York City, Chadbourne, Wallace, Parke & Whiteside, Esqs., Attention of Mr. Henry Wolff, at 25 Broadway, New York City, Francis X. Conway, Esq., Trustee for Silesian-American Corporation, at 110 East 42nd Street, New York City, E. O. Sowerwine, Esq., Trustee for Silesian-American Corporation, c/o Anaconda Copper Mining Co., 25 Broadway, New York City, Hon. James B. M. McNally, United States Attorney, Attention of Mr. Lynch, at Foley Square, New York City, and to George Zolotov, Esq., Securities & Exchange Commission, at 120 Broadway, New York City, advising them of the peril under which they would act in the event your deponent's

Affidavit of Leon Finley, Sworn to July 20, 1945

67

clients should suffer any damage in this matter. A copy of said letter dated May 18, 1945, is also annexed hereto and made part hereof.

Your deponent therefore prays this Court that until the entire question of title will be fully and entirely adjudicated between the Alien Property Custodian, your deponent's clients, and the Trustees herein, that nothing should be done or even condoned in this proceeding so that all parties in interest may have their day in Court, and have afforded unto them a full and complete opportunity to establish their rights and interests in the pending reorganization. It should be remembered that the Swiss principals have not unnecessarily delayed any proceedings before this Court, but that they had no control over the lack of facilities for communication and correspondence.

68

WHEREFORE, your deponent respectfully prays that instructions be issued to the Debtor Corporation that no new shares be issued to the Alien Property Custodian representing the 50,000 shares of the 7% cumulative non-voting preferred stock, and the 98,000 shares of the common stock, until the entire question as to who is rightfully entitled to the same shall have been fully, firmly and finally adjudicated by and between the Swiss Creditors and the Alien Property Custodian.

69

(Sworn to by Leon Finley on July 20, 1945.)

70

Exhibit to Affidavit of Leon Finley**COPY**

Class of Service
Desired

Ordinary **X**

Charge to the account of Mr. Leon Finley, 521 Fifth Avenue, N. Y. City.

71

WESTERN UNION CABLEGRAM**March 6, 1945.**

Alfred Schaefer
President, Union Bank of Switzerland
Barnhofstrasse 32, Zurich, Switzerland

72

WROTE YOU DECEMBER FOURTH REQUESTING ABSOLUTE PROOF OF
TITLE IN SWISS OF THEIR COMMON STOCKHOLDINGS IN SILESIAN-
AMERICAN CORPORATION INFORMATION NECESSARY BY MAY
TWENTY-FIFTH OR EARLIER WHEN CAN SAME BE EXPECTED HERE
CABLE REPLY

LEON FINLEY
521 Fifth Avenue,
New York City.

25

73

Exhibit to Affidavit of Leon Finley

COPY

**R C A
RADIOGRAM**

R. C. A. COMMUNICATIONS, INC.

**Received at 64 Broad Street, New York 4, at Mar 10 1945
Via RCA Fa Standard Time**

HBE CI SZ 5660 ZUERICH 23 9th 1425

74

NLT LEON FINLEY 521 FIFTH AVENUE NEW YORK

**RECEIVED YOURS FOURTH DECEMBER ONLY NOW STOP SHALL
REVERT IN DUE TIME**

ALFRED SCHAEFER BAHNHOFSTRASSE 45

P12

PASS

PASS P49

75

76

Exhibit to Affidavit of Leon Finley**COPY****R C A****RADIOGRAM****R. C. A. COMMUNICATIONS, INC.**

Received at 64 Broad Street, New York 4, at June 2 1945
Via RCA FAW 1039 FA Standard Time

77

NLHBE-SZ1104 BASEL 54 1 1008**NLT LEON FINLEY 521 FIFTH AVENUE NEW YORK CITY**

WE ARE IN THE COURSE OF PREPARING ALL NECESSARY DOCUMENTS PROOFS AND CERTIFICATIONS REQUIRE BY YOUR ESTABLISHING SWISS TITLE DOING EVERYTHING GETTING SAME YOUR HANDS EARLIEST POSSIBLE STOP IF NOT IN YOUR HANDS WHEN MATTER NEXT IN COURT REQUEST FURTHER ADJOURNMENT FOR ABOVE STATED REASON.

LAROCHE COMPANY**PASS C75**

78

Exhibit to Affidavit of Leon Finley**COPY****May 18, 1945**

Thomas A. McGrath, Esq.
25 Broadway,
New York City.

Re: Silesian-American Corporation

Dear Mr. McGrath:

I am in receipt of a letter from Goldwater & Flynn, 80
dated May 8, 1945, and am advised that a copy of this letter
has been sent to you.

In this letter, Goldwater & Flynn has advised all the in-
terested parties that they will be ready to proceed on June
26, 1945, with the motion now pending before the District
Court, for the Southern District of New York, made by the
Debtor Corporation to have the Court judicially determine
the effect of the demand of the Alien Property Custodian,
dated February 12, 1943, pursuant to which demand the
Alien Property Custodian requested that the Debtor Cor-
poration cancel on its books the outstanding certificates for
50,000 shares of its preferred stock of the par value of 81
\$100 per share, and the 98,000 shares of its common stock
without par value, and that the Debtor Corporation issue
to the Alien Property Custodian, new certificates of stock
therefor.

You will please be advised that I, as attorney for La
Roche & Co., Basle, Switzerland, Union Bank of Switzer-
land, Zurich, Switzerland, and the other Swiss banks in
interest, hereby advise you that according to my best
knowledge and information, my clients are the bona fide
owners of the said 50,000 shares of the preferred stock of
the par value of \$100 per share, and 98,000 shares of the
common stock without par value, of Silesian-American

82

Exhibit to Affidavit of Leon Finley

Corporation; that they have possession of the certificates of stock therefor; that they own, hold and possess the same in full compliance with the law; and that notwithstanding Vesting Order No. 370 issued by the Alien Property Custodian, Washington, D. C., my clients nevertheless still claim to be the bona fide and legal owners of the said shares, and the only ones entitled to possession of the stock certificates therefor.

83 I must advise you that any action that you may take in the premises, whether under Court order or otherwise, will be at your risk entirely, and that the issuance by you of any new certificates representing the shares of stock aforementioned, owned by my clients, will be at your risk entirely, and with the full reservation of all my clients' interests, and without prejudice to any of my clients' rights in the matter.

84 In the event that my clients should suffer any damage at any time hereinafter as a result of any action taken by the Debtor Corporation, and/or the Trustees herein, and/or by their attorneys, and/or by any other person and/or persons who may act herein, my clients and each of them, jointly and/or severally, will look to any and all of the said persons for full compensation, and will hold them fully liable and responsible for any loss or damage that they may suffer in the premises through any action that may be taken by such persons, jointly and/or severally, which shall be contrary to my clients' interests.

Thanking you for your courtesies in this proceeding, and assuring you of my continued cooperation, I am,

Yours very truly,

(sgd.) LEON FINLEY

LF:RP

Exhibit to Affidavit of Leon Finley

CC to:

Goldwater & Flynn, Esqs.
Attention: Mr. Oliver Cowan,
60 E. 42nd St., N. Y. City.

Chadbourn, Wallace, Parke & Whiteside, Esqs.
Attention: Mr. Henry Wolff,
25 Broadway, New York City.

Francis X. Conway, Esq.
Trustee for Silesian American Corp.,
110 E. 42nd St., N. Y. City.

E. O. Sowerwine, Esq.
Trustee for Silesian-American Corp.,
Anaconda Copper Mining Co.,
25 Broadway,
New York City.

Hon. James B. M. McNally
U. S. Attorney,
Attention: Mr. Lynch,
Foley Square, N. Y. City.

George Zolotov, Esq.
Securities & Exchange Commission,
120 Broadway, N. Y. City.

Affidavit Supplementing Petition by Thomas A. McGrath

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

—◆—
[SAME TITLE]
—◆—

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

89

THOMAS A. McGRATH, being duly sworn, deposes and says:

90

I am the attorney of record for Silesian-American Corporation, the Debtor herein, and am familiar with all the proceedings herein, including the order dated April 5th, 1943, directing that cause be shown why the Court should not judicially determine the effect of the demand of the Alien Property Custodian dated February 12th, 1943, that the Debtor cancel on its books the outstanding certificates for Fifty Thousand (50,000) shares of its preferred stock of \$100 per share and 98,000 shares of its common stock without par value, referred to in Vesting Order No. 370, and issue in lieu thereof new certificates registered in the name of the Alien Property Custodian, and why this Court should not issue its instructions to the Debtor with respect thereto, and why this Court should not grant such other further and different relief as is just and proper.

Sections 1 and 2 of Article VI of the By-Laws of the Debtor Silesian-American Corporation read as follows:

“STOCK CERTIFICATES AND TRANSFER OF STOCK.

“Section 1. The certificates of stock of the corporation shall be numbered and shall be entered in the books of the corporation as they are issued.

Affidavit Supplementing Petition by Thomas A. McGrath 91

They shall exhibit the holder's name and the number of shares and shall be signed by the president or a vice-president and the treasurer or an assistant treasurer, or the secretary or an assistant secretary, and shall bear the corporate seal.

"Section 2. Transfers of stock shall be made on the books of the corporation only by the person named in the certificate or by attorney, lawfully constituted in writing, and upon surrender of such certificate."

The order entered herein dated July 30th, 1941 declaring that the Debtor Silesian-American Corporation is unable to meet its debts as they mature and appointing trustees contains the following provisions:

"11. Silesian-American Corporation, and its officers, directors, agents and employees, and all other persons, including but not limited to those claiming to act by, through or under Silesian-American Corporation, are hereby enjoined from interfering in any way whatever with the possession or management of all or any part of the property over which the Trustees are hereby appointed and from interfering in any way to prevent the discharge of their duties or their operation of the business of Silesian-American Corporation; and any parties in interest may apply for further direction of this Court."

Under date of May 18th, 1945, I received a letter from Leon Finley, Esq., attorney of record for La Roche & Co., the Union Bank of Switzerland, the Banque Cantonal de Berne, and Aktiengesellschaft Leu & Company, which letter contained the following paragraphs:

94 *Affidavit Supplementing Petition by Thomas A. McGrath*

95 "You will please be advised that I, as attorney for La Roche & Co., Basle, Switzerland, Union Bank of Switzerland, Zurich, Switzerland, and the other Swiss banks in interest, hereby advise you that according to my best knowledge and information, my clients are the bona fide owners of the said 50,000 shares of the preferred stock of the par value of \$100 per share, and 98,000 shares of the common stock without par value, of Silesian-American Corporation; that they have possession of the certificates of stock therefor; that they own, hold and possess the same in full compliance with the law; and that notwithstanding Vesting Order No. 370 issued by the Alien Property Custodian, Washington, D. C., my clients nevertheless still claim to be the bona fide and legal owners of the said shares, and the only ones entitled to possession of the stock certificates therefor.

96 "I must advise you that any action that you may take in the premises, whether under Court order or otherwise, will be at your risk entirely, and that the issuance by you of any new certificates representing the shares of stock aforementioned, owned by my clients, will be at your risk entirely, and with full reservation of all my clients' interests, and without prejudice to any of my clients' rights in the matter.

"In the event that my clients should suffer any damage at any time hereinafter as a result of any action taken by the Debtor Corporation, and/or the Trustees herein, and/or by their attorneys, and/or by any other person and/or persons who may act herein, my clients and each of them, jointly and/or severally, will look to any and all of the said persons for full compensation, and will hold them fully liable and responsible for my loss or damage that they may

Affidavit Supplementing Petition by Thomas A. McGrath 97

suffer in the premises through any action that may be taken by such persons, jointly and/or severally, which shall be contrary to my clients' interests."

A complete copy of the said letter is annexed hereto and marked Exhibit A.

In connection with subparagraph (c) of paragraph 11 of the petition verified by me March 31st, 1943, it appears that the New York Stock Transfer Tax Law as amended by Ch. 443, L. 1943 (C.C.H. Stock Transfer Guide, p. 36323-2, Par. 6020B) now exempts transfers from a foreign country or national thereof to the United States or any agency thereof pursuant to §5(b) of the Trading With the Enemy Act as amended by the First War Powers Act. It is also observed that the statement in paragraph 9(d) of the petition that "The reference in the statute to 55 Stat. 838 apparently represents an erroneous attempt to refer to the First War Powers Act . . ." is itself incorrect. The reference is a correct citation of that statute.

It is also observed that the said petition does not set forth the petitioners' claim that subdivision 5(b) of the Trading With the Enemy Act as enacted by the first War Powers Act of 1941 is unconstitutional, and the said petition is hereby amended so as to include such a claim.

It is also noted that the order of July 30th, 1941 herein, appointing trustees, contains no provision authorizing the trustees to permit the officers of the Corporation to make transfers of the outstanding shares of stock of the Corporation on its books in accordance with the provisions of law, or to incur the cost of maintaining the corporate existence of the Debtor including the necessary expenses of the preservation of records, and the registration and transfer of the corporate shares.

(Sworn to by Thomas A. McGrath on June 26, 1945.)

100

Exhibit A to Affidavit of Thomas A. McGrath

This exhibit is the original letter of which a copy is annexed to the affidavit of Leon Finley (pp. 27 to 29, *supra*.)

Order Appointing Trustees

IN THE
DISTRICT COURT OF THE UNITED STATES,

101

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

102

This cause coming on to be heard on the petition of Silesian-American Corporation, verified the 29th day of July, 1941, and duly filed herein on July 29, 1941, and the Court being duly advised of the premises and being satisfied that said petition of Silesian-American Corporation complies with the requirements of Chapter X of an act entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved July 1, 1898, and acts amendatory thereof and supplemental thereto (hereinafter referred to as the "Bankruptcy Act"), and that said petition has been filed in good faith, it is

ORDERED, ADJUDGED AND DECREED:

1. That said petition of Silesian-American Corporation complies with the requirements of Chapter X of the Bankruptcy Act and has been filed in good faith, and that said petition is hereby approved as properly filed under Chapter X of the Bankruptcy Act;

Order Appointing Trustees

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2. That said petitioner, Silesian-American Corporation, is unable to met its debts as they mature;

3. That by reason of the facts set forth in said petition of Silesian-American Corporation, said petitioner requires relief under said Chapter X of the Bankruptcy Act and adequate relief cannot be obtained under Chapter XI of the Bankruptcy Act;

4. That Francis X. Conway, 233 B'way, N. Y. C., be and he hereby is appointed Trustee of the estate and all and singular the assets and properties, rights and franchises of whatever kind, character and description whatsoever and wheresoever situate, whether within or without the Southern District of New York, of Silesian-American Corporation, and that E. O. Sowerwine, an officer of Silesian-American Corporation, to wit, the Secretary thereof, be and he hereby is appointed an additional Trustee for the purposes specified in Section 189 of the Bankruptcy Act;

104

5. That the amount of the bond to be given by Francis X. Conway as Trustee of the estate of Silesian-American Corporation, conditioned to the fact that he will well and truly perform the duties of his office as such Trustee and duly account for all moneys and properties whatever which may come into his hands, and perform all things which he shall be directed by the Court to do as such Trustee; is fixed at the sum of \$5000, and that the amount of such bond to be given by E. O. Sowerwine as such additional Trustee is fixed at the sum of \$5,000.00/\$

105

6. That said Trustees are entitled forthwith to possession of and vested with the title to the property of Silesian-American Corporation, and shall have and may

Order Appointing Trustees

exercise respectively all powers conferred by the Bankruptcy Act upon Trustees so appointed pursuant to the provisions thereof;

107 7. That without in any way limiting the generality of the foregoing powers, the Trustees appointed hereunder are empowered to manage, operate and conduct the business and properties of Silesian-American Corporation, wherever situate, and to continue to conduct all the business heretofore conducted by Silesian-American Corporation until the further order of this Court, all according to law and subject to such supervision and control by the Court as the Court may exercise by further orders herein they shall not however withdraw funds until further orders of this Court. The appointment of the Trustees is made subject to the further order of this Court and the Court reserves the right to make such other and further orders and to confer such other and further authority on said Trustees, and to impose such limitations and restrictions upon such Trustees, or any of them, in regard to the custody and management of said property, as the Court may deem expedient and necessary;

8. That the Trustees are directed, authorized and empowered to institute and prosecute any suits, actions or proceedings at law, in equity or in courts of bankruptcy, either within or without the Southern District of New York, that may be deemed necessary by the Trustees forthwith to obtain possession and control of any and all property, title to which is vested in the said Trustees under the provisions of this decree and the provisions of the Bankruptcy Act, and fully to effectuate all of the terms and provisions of this decree and of the said Bankruptcy Act, and the Trustees are further directed, authorized and empowered to continue the prosecution of and to be substituted

Order Appointing Trustees

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or intervene in any suit, action or proceeding, at law, in equity or in courts of bankruptcy, either within or without the Southern District of New York heretofore instituted by or against the petitioner, Silesian-American Corporation;

9. That Silesian-American Corporation and all other persons, firms or corporations having in their possession any of the property of Silesian-American Corporation, are hereby ordered to deliver said property forthwith to the Trustees appointed herein and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper;

110

10. That the Trustees so appointed shall within twenty days of the entry of this order cause a notice to be mailed to each creditor of Silesian-American Corporation at his last known post office address and to the stockholders of Silesian-American Corporation as the same appear upon its books, and to Guaranty Trust Company of New York, as Indenture Trustee under the Collateral Trust Indenture dated August 1, 1926 of Silesian-American Corporation, and to the Securities and Exchange Commission, and to the Secretary of the Treasury, and to publish such notice in the New York Sun that a hearing will be held herein before this Court in Room 1506 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 24th day of September, 1941, at 10 o'clock a. m., at which hearing or at any adjournment thereof objections may be heard to the retention in office of the Trustees appointed hereby upon the ground that they are not qualified, or that said Francis X. Conway is not disinterested, as provided in Section 158 of Chapter X of the Bankruptcy Act;

111

112

Order Appointing Trustees

113

11. Silesian-American Corporation, and its officers, directors, agents and employees, and all other persons, including but not limited to those claiming to act by, through or under Silesian-American Corporation, are hereby enjoined from interfering in any way whatever with the possession or management of all or any part of the property over which the Trustees are hereby appointed and from interfering in any way to prevent the discharge of their duties or their operation of the business of Silesian-American Corporation; and any parties in interest may apply for further direction of this Court;

114

12. That all creditors, stockholders, and all persons claiming or acting by, through or under them, and all Sheriffs and Marshals and other like officers, agents, attorneys, solicitors, representatives and employees, and all other persons, firms, associations and corporations are hereby enjoined and restrained from instituting, continuing or prosecuting any action at law or suit or proceeding in equity or any other proceeding against Silesian-American Corporation in any court of law or equity, or before any association, organization or arbitration or Referee or umpire or other court or tribunal or otherwise, or from executing or issuing, or causing the execution or issuance out of any court or any public office of any writ, process, summons, attachment, subpoena, replevin, execution or other proceeding, for the purpose of impounding or taking possession of, or interfering with any property constituting the estate of Silesian-American Corporation, or attempting to take into their possession any part of the property constituting the estate of Silesian-American Corporation wheresoever located, whether in this state, judicial district, in any other state, territory or possession of the United States, or elsewhere, and all other persons, firms, association and corporations are hereby enjoined and restrained

6
Order Appointing Trustees

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from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of, or in any way interfere with any property, assets or effects in the possession of the Trustees, or owned by Silesian-American Corporation, whether in its possession or otherwise, and from doing any act or thing whatsoever to interfere with the possession and management by the Trustees of the assets, properties and business of Silesian-American Corporation, real, personal or mixed, tangible or intangible, of whatsoever kind and description, and wheresoever situated, whether in this state, judicial district, in any other state, territory or possession of the United States or elsewhere, or interfering in any manner directly or indirectly with the possession, operation or management by the Trustees of the estate of Silesian-American Corporation, or interfering in any way with the Trustees in the discharge of their duties, or interfering in any way with the administration and disposition of the affairs and properties constituting the estate of Silesian-American Corporation. All persons, firms, corporations, their agents, attorneys, representatives and employees are hereby enjoined and stayed from commencing or continuing any judicial proceeding to enforce any lien upon the estate of Silesian-American Corporation until further order of this Court, or until after final decree herein. All suits against Silesian-American Corporation are hereby stayed until after final decree herein;

116

117

13. The Court reserves full right and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

Dated: New York, July 30, 1941.

(sgd) JOHN W. CLANCY,
 U. S. D. J.

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Excerpt from Trustee's Statement

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

119

For the purpose of presenting a complete picture of the status of Silesian-American Corporation (hereinafter sometimes called the "Debtor") the Trustee deems it advisable to set forth herein the background of its organization and purposes, its capital structure, financing, management and personnel so as to show more clearly the results of his investigation into the property, liabilities and financial condition of the Debtor and the operation of its business.

120

Since its incorporation the Debtor has functioned only as a holding company, receiving substantially all of its income from its investments in bonds and in the stock of subsidiary companies and interest on loans to such subsidiaries. Its present financial condition can be traced directly to the impact of world conditions upon the operations of its subsidiaries and particularly to the outbreak of war in Europe.

.

**Efforts to Provide for Full Payment of the 7%
Sinking Fund Gold Bonds**

As a result of the substantial holdings of stock in the Debtor by Non Ferrum, a Swiss corporation, heretofore referred to, the Debtor is a blocked national, pursuant to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and no transaction with respect to its property or assets, pledged or unpledged, may be effected without a license from the Treasury Department. Moreover, presumably because of its relationship as an affiliate

*Efforts to Provide for Full Payment of the 7%
Sinking Fund Gold Bonds*

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or subsidiary of the Germany Company, Non Ferrum now appears on the "Proclaimed List of Certain Blocked Nationals" which has been promulgated pursuant to Proclamation No. 2497 of the President of July 17, 1941, and for all practical purposes is considered as a national of an enemy country. The shares of stock of the Debtor owned by Non Ferrum had been pledged as security for loans of several million dollars made by certain Swiss banks. Said Swiss banks also own an aggregate of \$640,000 out of the total outstanding \$2,509,500 of the Debtor's 7% Collateral Trust Sinking Fund Gold Bonds, or more than 25% of the entire outstanding bonds. On June 24, 1941, prior to the reorganization proceedings, the Debtor made an application to the Treasury Department for a license to borrow from said Swiss banks the sum of \$2,200,000 which, together with the cash then on hand, would have provided payment in full of principal and interest on all of the outstanding bonds. This arrangement contemplated that the lenders would purchase all of the stock of Silesian Holding Company at \$6.85 per share. Said application was denied by the Treasury Department.

122

After their appointment in this proceeding, the undersigned and E. O. Sowerwine, additional Trustee, continued negotiations with the representatives of said Swiss banks and on or about August 27, 1941 they and the Debtor filed an application with the Treasury Department for a license authorizing a proposed loan of \$2,200,000, the proceeds of which were to be used as before, for the payment in full of principal and interest on the entire outstanding bonds. This application was accompanied by an application for a license authorizing agreements for the sale of shares of Silesian Holding Company (or voting trust certificates therefor) to Swiss interests. The proceeds of the loan were to be made immediately available for payment of the bonds, but the note evidencing the loan, the certificates for shares of stock of Silesian Holding Company, and the purchase price therefor, were to be deposited in escrow, pend-

123

124

*Efforts to Provide for Full Payment of the 7%
Sinking Fund Gold Bonds*

ing the issuance of a further license from the Treasury Department authorizing the release thereof from escrow. This application was likewise denied by the Treasury Department on October 31, 1941.

125

The said Trustees still continued their negotiations in an effort to arrive at some arrangement for which the Treasury Department would issue a license. On December 12, 1941, they and the Debtor filed a new application for a license to authorize the obtaining of a loan from said Swiss banks in the amount of \$1,700,000. Said loan was to be evidenced by a 10 year unsecured note, with interest at 4% per annum (interest payable at maturity), the note to be held in escrow until released by Treasury Department license. The note was to contain a right of prepayment at any time. All previous proposed agreements for sale of the shares of Silesian Holding Company had been rescinded and abandoned. The proceeds of the \$1,700,000 loan, together with available corporate funds, were to be applied to the payment in full of principal and interest on all of the outstanding bonds other than the \$640,000 of such bonds held by said Swiss banks. As to these bonds, an extension agreement was to be entered into for a 10 year period or longer, if necessary under Treasury regulations. As an alternative, a license was requested to permit the Swiss banks to buy the bonds (not owned by them) on the New York Stock Exchange at par and interest. This application was also denied by the Treasury Department on January 23, 1942. To the date of this report, there are no proposals which would warrant the filing of any other application.

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New York, May 7th, 1942.

FRANCIS X. CONWAY

Trustee in Reorganization Proceedings of
SILESIA-AMERICAN CORPORATION,
25 Broadway, New York, N. Y.

**Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto**

LEON FINLEY
COUNSELOR AT LAW
521 FIFTH AVENUE
NEW YORK
Murray Hill 2-7360

August 21, 1945

Hon. John W. Clancy
U. S. Court House
Foley Square,
New York City.

128

Re: Silesian-American Corp.

My dear Justice Clancy:

I am enclosing herewith the following photostatic copies of documents received by me the other day from Switzerland, which I would kindly ask you to consider on the motion pending before you in the above matter:

1. Letter received by me from La Roche & Co., dated August 4, 1945
2. Affidavit of Dr. Eduard Schulte, dated July 25, 1945
3. Affidavit of Union Bank of Switzerland, dated July 26, 1945
4. Affidavit of Erzag Limited, dated July 28, 1945
5. Affidavit of La Roche & Co., dated July 31, 1945

129

I spoke to your secretary this morning, and advised her of my filing these papers, and request you to be kind enough to give me an appointment at your convenience so that I may discuss the questions contained in the enclosed papers with you.

Thanking you, I am,

Respectfully yours,

LF:RP
Encl.

(sgd.) LEON FINLEY

130

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

LA ROCHE & Co.

Basle, August 4th, 1945.
Rittergasse 25.

Dr. Leon Finley,
Counselor at Law,
New York.
521 Fifth Avenue.

131 Dear Sir,

In conformity with our exchange of telegrams we beg to send you in the meantime the following affidavits:

1. affidavit Dr. Eduard Schulte, actually at Zurich, dated the 25th July 1945,
2. affidavit Union Bank of Switzerland, dated the 26th July 1945,
3. affidavit Erzag Limited, dated the 28th July 1945,
4. affidavit our Bank, dated the 31st July 1945,

132 all of them duly legalized by a competent public notary and certified by U. S. A. Consulate.

Should you need for your proceedings other documents we beg to let us know immediately.

We are looking for your further news and remain, dear Sir,

Yours truly

(Illegible)

4 enclosures.

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

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A. AFFIDAVIT

I the undersigned Dr. Eduard Schulte actually at Zurich (Switzerland) as a political refugee since December 1943, well known to the State Department of the United States, declare the following under oath:

1. In 1929 a group of Swiss Banks under the leadership of the Union Bank of Switzerland, granted a loan of \$1,500,000. to NON FERRUM Gesellschaft zur Finanzierung von Unternehmungen des Bergbaus und der Industrie der Nichteisenmetalle, Zurich. The following securities were pledged for this loan:

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98,000 Common shares of the Silesian American Corporation Wilmington/Delaware, as to assignment of pledge dated 12. November 1934,

\$1,500,000.—preferred shares of the Silesian American Corporation Wilmington/Delaware, as to assignment of pledge dated 24. February 1932.

2. On the 25. February 1937 a group of Swiss Banks under the leadership of La Roche & Co., Basle granted to Erzag Ltd. Zurich a loan of Sfr.12.000.000.—and £600.000.—, for which loan my company the Bergwerksgesellschaft Georg von Giesche's Erben, Breslau (Giesche Breslau) pledged in favour of Erzag Ltd. and La Roche & Cie Basle

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\$3,500,000.—preferred shares of the Silesian American Corporation Wilmington/Delaware.

3. With general power of attorney of Giesche Breslau and NON FERRUM, I committed both Companies on the 19. December 1941, to transfer the voting rights for the pledged preferred and common shares of the Silesian American Corporation at any time and ir-

✓

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*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

revocably. These voting rights have been valuable without any interruption.

4. All other pending questions, regarding the Swiss group La Roche & Co., Basle and its legal and beneficial property of Giesche assets, have been consolidated through an arrangement between La Roche & Co., Basile, Erzag Ltd. and Giesche Breslau on 21. August 1942.

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The final performance of both above mentioned agreements could however not be notified to anybody without jeopardizing legitimate Swiss and American interests towards Nazi-Germany; the Nazi authorities looked upon all the transactions concluded by the Giesche companies exclusively from the typical Nazi points of view. For this very reason, my personal security (being the head of the Giesche concern) was endangered as long as I lived in Germany and this especially also in connection with my continued interventions for the protection of the American interests against the German "Commissioner for Enemy's property". I succeeded in getting released the company's property from the grip of the Commissioner; without my interventions the Giesche, Spolka Kattowitz would have been completely looted by the Hermann Goering concern and other interested Nazi groups.

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Zurich, the 25. July 1945.

EDUARD SCHULTE

(Legalization or acknowledgment before Swiss Notary Public dated July 25, 1945, and certification of Notary by Vice-Consul of United States at Zurich, Switzerland.)

(SEAL)

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

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DECLARATION

We, the undersigned Union Bank of Switzerland herewith confirm the following hypothecation in our favour as representative of a Swiss Consortium of Banks:

98,000 common shares of the Silesian American Corporation, Wilmington/Delaware, USA—New York, for a credit of originally \$1,500,000.—nom. granted to the Non Ferrum, Zurich;

nom. \$1,500,000. pref. shares of the Silesian American Corporation, mortgaged on February 24th, 1932 as security for the above mentioned credit of \$1,500,000.

140

Zurich, July 26th, 1945

UNION BANK OF SWITZERLAND
LEO BIRCHLER JOSEF VOSER

(Legalization or acknowledgment before Swiss Notary Public dated July 26, 1945, and certification of Notary by Vice-Consul of United States at Zurich, Switzerland.)

AFFIDAVIT

The undersigned Erzag Limited confirms herewith that in conformity with the agreement of the 25th February 1937 for a loan of Sfr. 12,000,000—and £600,000.—were pledged \$3,500,000 pref. shares of the Silesian American Corporation, Wilmington/Delaware.

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The forementioned loan was refinanced through a Swiss Bank group under the leadership of La Roche & Co., Basle and therefore the above mentioned \$3,500,000 pref. shares

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*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

of the Silesian American Corporation, Wilmington/Delaware were pledged in favour of La Roche & Co. Basle.
Zurich, July 28th, 1945

ERZAG Limited
RUDOLF HOFER
ENRICO TRENTINI

143

(Legalization or acknowledgment before Swiss Notary Public dated July 30, 1945, and certification of Notary by Vice-Consul of United States at Zurich, Switzerland.)

AFFIDAVIT

The undersigned bank La Roche & Co., Basle, acting as protector of the interests of a Swiss Bank group, confirms herewith the pledging of

\$3,500,000.- pref. shares of the Silesian American Corporation, Wilmington/Delaware

as to assignment of pledge dated 25th February 1937 in favour of a Swiss Bank group under the leadership of the undersigned bank.

144

The foregoing assignment of pledge refers to the affidavit of Dr. Eduard Schulte actually at Zurich, dated 25th July 1945.

LA ROCHE & Co.

MAX RITZ

Basle, July 31st, 1945.

(Legalization or acknowledgment before Swiss Notary Public dated July 31, 1945, certification of Notary's signature by Chancellery of State, Canton of Basle City, dated July 31, 1945, and certification by Vice-Consul of United States at Basle, Switzerland, as to signature of Deputy Chancellor of State.)

Opinion of the Court, Dated Sept. 25, 1945

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

In Reorganization No. 79,205.

JOHN W. CLANCY, U. S. D. J.

The debtor corporation has applied to the Court for instructions with respect to its obligation under a demand made by the Alien Property Custodian that it cancel on its books outstanding certificates for some of its shares and issue to him a new certificate therefor. The debtor claims to be fearful to incur double liability through the issue of another certificate for the same stock and the alleged present interest in it of certain Swiss banks. The vesting order of the Custodian found that the stock was held for the benefit of an enemy. The statutory discharge from liability, §5b or §7e, protects the debtor corporation and relieves it of doubt in the premises. Whatever may be the interests or rights of the Swiss banks, they cannot be considered here. Hearsay statements, unsupported by documents, allege that these banks are pledgees of the stock. These statements create no issue for our consideration. The banks are parties herein only to the extent that they have been recognized in the reorganization proceeding as possible owners of a claimed interest which they have never been called upon to prove. They are not here because of any action taken against them or any recognition given them by the Custodian or even by reason of any established interest in the stock.

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The debtor is instructed to issue a new certificate of stock to the Alien Property Custodian.

Dated: New York, N. Y.,

September 25, 1945.

JOHN W. CLANCY,
United States District Judge.

Order Appealed From Dated Oct. 30, 1945

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

149 An application by the Debtor for a judicial determination of the effect of the demand of the Alien Property Custodian dated February 12, 1943, that the Debtor cancel on its books the outstanding certificates for 50,000 shares of its preferred stock of the par value of \$100 per share, and 98,000 shares of its common stock without par value, represented by preferred stock certificates Nos. 258, and 288 to 313, inclusive, and common stock certificates Nos. 256 to 265, inclusive, heretofore issued to Non Ferrum Gesellschaft sur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, of Zurich, Switzerland, referred to in Vesting Order No. 370 and issue in lieu thereof new certificates in the name of the Alien Property Custodian and for instructions to the Debtor with respect thereto, and for such other, further and different relief as is just and proper, having come on to be heard before the undersigned on the 26th day of June, 1945, and after hearing Thomas A. McGrath, Esq., attorney for the Debtor, Chadbourne, Wallace, Parke & White-
 150 side, Esqs., (by William Gilligan, Esq., of counsel), attorneys for Silesian Holding Corporation, Leon Finley, Esq., attorney for certain Swiss Banks, all in opposition to the claim of the Alien Property Custodian; and John F. X. McGehey, United States Attorney for the Southern District of New York (by William L. Lynch, Assistant United States Attorney, of counsel), attorney for the Alien Property Custodian, in support of the claim of the Alien Prop-

Order Appealed From Dated Oct. 30, 1945

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erty Custodian; and Goldwater & Flynn, Esqs., (Oliver T. Cowan, Esq., of counsel), attorneys for the trustees, appearing but not opposing the application;

Now, on all the proceedings had herein and the written opinion dated September 25, 1945, filed herein, it is

ORDERED, that the Debtor cancel on its books and records all evidence showing that said 50,000 shares of Preferred Stock (represented by outstanding Certificates Nos. 258 and 288 to 313, inclusive) and 98,000 shares of Common Stock (represented by outstanding Certificates Nos. 256 to 265, inclusive), are owned by said Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle; and it is

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FURTHER ORDERED, that the Debtor, through its proper officers, be and hereby is directed to take all necessary steps to have issued and delivered to the Alien Property Custodian, Washington, D. C., account numbered 28-1722, in lieu of the outstanding certificates representing the aforesaid shares, new certificates representing 50,000 shares of the Debtor's 7% cumulative non-voting preferred stock and 98,000 shares of the Debtor's common stock; and it is

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FURTHER ORDERED, that the execution of this Order is hereby stayed for ten days from the date of the entry hereof.

Dated: New York, N. Y.,
October 30th, 1945.

JOHN W. CLANCY,
U. S. D. J.

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Notice of Appeal, Dated Nov. 3, 1945

**DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

155 NOTICE IS HEREBY GIVEN that Silesian-American Corporation, Debtor above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the Order entered in this proceeding on the 31st day of October, 1945 regarding the cancellation on the records of the Debtor of all evidence showing that certain shares of the Debtor are registered in the name of and owned by Non-Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, of Zurich, Switzerland, and the issuance of new certificates representing the said shares to the Alien Property Custodian, and from each and every part of the said Order.

Dated, at New York, New York, November 3rd, 1945.

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THOMAS A. McGRATH
Attorney for Debtor
Office & P. O. Address
25 Broadway
Borough of Manhattan
New York City

Copy to:

JOHN F. X. MCGOHEY, Esq.
U. S. District Attorney for
Southern Dis. of N. Y.
Attorney for Alien Property Custodian
U. S. Court House
Foley Square, New York, New York

Notice of Appeal, Dated Nov. 3, 1945

CHADBOURNE, WALLACE, PARKE &
WHITESIDE, Esqs.

Attorneys for Silesian Holding Company
25 Broadway, New York, N. Y.

DAVIS, POLK, WARDWELL, GARDINER
& REED, Esqs.

Attorneys for Guaranty Trust Co.
15 Broad Street, New York, N. Y.

GEORGE ZOLOTAR, Esq.

Attorney for Securities and
Exchange Commission
120 Broadway, New York, N. Y.

LEON FINLEY, Esq.

Attorney for Union Bank of
Switzerland and others
521 Fifth Avenue, New York, N. Y.

GOLDWATER & FLYNN, Esqs.

Attorneys for Trustees
60 East 42nd Street
New York, N. Y.

SCRIBNER & MILLER, Esqs.

Attorneys for Bondholders Protective Committee
40 Wall Street, New York, N. Y.

THE GUARANTY TRUST CO. OF N. Y.

As Transfer Agent of Silesian-American Corp.
140 Broadway, New York, N. Y.

BANK OF THE MANHATTAN CO.,

As Registrar of Silesian-American Corp.
40 Wall Street, New York, N. Y.

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Assignment of Errors
(Statement of Points)

DISTRICT COURT OF THE UNITED STATES,
 FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

161

NOW COMES SILESIAN-AMERICAN CORPORATION, Debtor-Appellant, by Thomas A. McGrath, its attorney, and in connection with its appeal from the order and each and every part thereof made by the United States District Court, Southern District of New York, under date of October 30th, 1945, and entered October 31st, 1945, directing that the Debtor cancel on its records all evidence showing that certain shares of the Debtor are owned by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, and in lieu thereof issue new certificates to the Alien Property Custodian for said shares and containing certain other directions, appellant says that in the record, proceedings and order aforesaid, manifest error has intervened to the prejudice of the said appellant to wit:

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1. The Court erred in making the order appealed from.
2. The Court erred in directing that the Debtor cancel on its books and records all evidence showing that 50,000 of preferred stock and 98,000 shares of common stock of the Debtor are owned by Non-Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, without requiring the surrender and cancellation of outstanding certificates representing the said shares.

Assignment of Errors (Statement of Points)

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3. The Court erred in directing the Debtor to have issued and delivered to the Alien Property Custodian new certificates representing 50,000 shares of the Debtor's 7% cumulative non-voting preferred stock and 98,000 shares of the Debtor's common stock without requiring the surrender of the outstanding certificates representing the said shares.

4. The Court erred in finding that the statutory discharge from liability contained in Sections 5(b) and 7(c) of the Trading With the Enemy Act protects the Debtor and relieves it of doubt as to the possibility of double liability. 164

5. The Court erred in finding that whatever may be the interest or rights of the Swiss banks; they could not be considered by the Court.

6. The Court erred in failing to give the Swiss banks an opportunity to establish their interest in the shares of the Debtor.

7. The Court erred in assuming that the Vesting Order of the Alien Property Custodian was a valid and effective order. 165

8. The Court erred in failing to find that except for subdivision 5(b) the Trading With the Enemy Act of 1917, c. 106, 40 Statutes at Large 415 *et seq.* as amended, has no vitality with respect to World War II.

9. The Court erred in failing to find as a matter of law that subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, as an autonomous statute is unconstitutional for lack of due process.

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Assignment of Errors (Statement of Points)

10. The Court erred in failing to find as a matter of law that subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, as an autonomous statute is unconstitutional because it purports to take the property of friendly aliens without making provision for just compensation.

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11. The Court erred in failing to find as a matter of law that subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, as an autonomous statute is unconstitutional as representing an unlawful delegation of legislative powers as to the seizure of the property of friendly aliens.

12. The Court erred in failing to find as a matter of law that if the Trading With the Enemy Act of 1917 as amended possesses vitality with respect to World War II subdivision 5(b) thereof as amended by c. 593, Title III, 55 Statutes at Large 839, is nevertheless unconstitutional for lack of due process unless the phrase "foreign country" in the vesting clause of subdivision 5(b) is construed as meaning "enemy or ally of enemy foreign country."

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13. The Court erred in failing to find as a matter of law that if the Trading With the Enemy Act of 1917 as amended possesses vitality with respect to World War II, subdivision 5(b) thereof as amended by c. 593, Title III, 55 Statutes at Large 839, is nevertheless unconstitutional as depriving friendly aliens of their property without just compensation unless the phrase "foreign country" in the vesting clause of subdivision 5(b) as amended is construed as meaning "enemy or ally of enemy foreign country."

14. The Court erred in failing to find as a matter of law that if the Trading With the Enemy Act of 1917 as

Assignment of Errors (Statement of Points)

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amended possesses vitality with respect to World War II, subdivision 5(b) thereof as amended by c. 593, Title III, 55 Statutes at Large 839, is nevertheless unconstitutional as representing an unlawful delegation of legislative power.

15. The Court erred in failing to find as a matter of law that if the provisions of the Trading With the Enemy Act of 1917 as amended other than subdivision 5(b) possess vitality with respect to World War II, Vesting Order No. 370 of the Alien Property Custodian nevertheless derived no validity from such provisions other than subdivision 5(b) as amended, because the only powers delegated to the Alien Property Custodian by the President were the powers conferred upon the President by subdivision 5(b) as amended.

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16. The Court erred in failing to find as a matter of law that if subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, is constitutional, Executive Order No. 9193 of July 6th, 1942, is nevertheless an unconstitutional exercise by the President of powers granted by subdivision 5(b) as amended:

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17. The Court erred in failing to find as a matter of law that if the provisions of the Trading With the Enemy Act of 1917 as amended, other than subdivision 5(b), possess vitality with respect to World War II, Section 8 thereof precluded the Alien Property Custodian from taking possession of shares of an enemy or ally of enemy held by a person who was not an enemy or ally of enemy under a lawful pledge or lien or other right in the nature of security which, by law or by the terms of the instrument

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Designation of Contents of Record

creating such pledge or lien or right might be disposed of on notice of presentation or demand.

18. The Court erred in failing to defer a determination of the issues before it until the Swiss banks were enabled to present the evidence of their rights in the shares claimed by the Alien Property Custodian.

WHEREFORE said appellant prays that said order of said District Court of the United States may be reversed, etc.

173 Dated, New York, New York, Nov. 3, 1945.

THOMAS A. McGRATH,
Attorney for Debtor-Appellant,
Office and Post Office Address:
25 Broadway,
Borough of Manhattan,
New York 4, New York.

Designation of Contents of Record

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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SILESIAN AMERICAN CORPORATION, Debtor-Appellant hereby designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Order to show cause dated April 5, 1943, and supporting petition verified March 31, 1943, with exhibits annexed thereto.

Designation of Contents of Record

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2. Affidavit of Leon Finley, sworn to July 20, 1945, and exhibits annexed thereto.

3. Affidavit supplementing petition by Thomas A. McGrath, sworn to June 26, 1945, of which a copy of the annexed exhibit appears as an exhibit to the affidavit of Leon Finley, sworn to July 20, 1945.

4. Original order appointing trustees, etc., dated July 30, 1941.

5. That portion of Trustee's Statement and Report of Investigation under Section 167 (5) of the Bankruptcy Act, approved by order dated May 2, 1942, which appears under the following heading:

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"Effort to Provide for Full Payment of the 7% Sinking Fund Gold Bond."

6. Letter of Leon Finley, dated August 21, 1945, together with photostatic copies, therein referred to, of (1) letter from La Roche & Co., dated August 4, 1945, (2) declaration of Dr. Eduard Schulte, dated July 25, 1945, (3) declaration of the Union Bank of Switzerland, dated July 26, 1945, (4) declaration of Erzag Ltd., dated July 28, 1945, and (5) declaration of La Roche & Co., dated July 31, 1945, including each of the said photostatic copies.

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7. Opinion of the Court, dated September 25, 1945.

8. Order appealed from, dated October 30, 1945.

9. Notice of appeal, dated November 3, 1945.

10. Assignment of errors, dated November 3, 1945.

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Stipulation as to the Record

11. Designation of the contents of record.

Dated at New York, N. Y., November 27, 1945.

THOMAS A. McGRATH
 Attorney for Debtor-Appellant
 Silesian-American Corporation
 25 Broadway
 Borough of Manhattan
 New York, N. Y.

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Stipulation as to the Record

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

180

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the District Court in the appeal of Silesian-American Corporation, Debtor, in the above-entitled matter.

IT IS FURTHER STIPULATED AND AGREED that the foregoing shall also constitute a true transcript of the record of the said District Court in the appeal of Silesian Holding Company, a party entitled to be heard in the above entitled matter under the provisions of Sec. 206 of the Bankruptcy Act, except that as to such appeal, in the foregoing notice of appeal, assignment of errors (statement of points), and designation of contents of the record, wherever the words "Silesian-American Corporation, Debtor" appear in any of the said papers (other than in the title) there is deemed

Stipulation as to the Record

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to have been substituted in place thereof the words "Silesian Holding Company"; and wherever the words "THOMAS A. McGRATH" or "THOMAS A. McGRATH, attorney for SILESIA-AMERICAN CORPORATION, Debtor" appear in the said papers there is deemed to have been substituted in place thereof the words "CHADBOURNE, WALLACE, PARKE & WHITESIDE" or "CHADBOURNE, WALLACE, PARKE & WHITESIDE, attorneys for SILESIA HOLDING COMPANY" respectively.

Dated, New York, New York, December 10th, 1945.

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THOMAS A. McGRATH
Attorney for Silesian-American Corporation,
Debtor-Appellant

CHADBOURNE, WALLACE, PARKE & WHITESIDE
Attorney for Silesian Holding Company,
Appellant

JOHN F. X. McGOHEY
U. S. District Attorney for the Southern
District of New York
Attorney for Alien Property Custodian,
Appellee

183

GOLDWATER & FLYNN
Attorneys for Trustees, Appellees

GEORGE ZOLOTAR
Attorney for Securities & Exchange
Commission, Appellee

LEON FINLEY
Attorney for Swiss Banks, Appellees

SCRIBNER & MILLER
Attorneys for Bondholders' Protective
Committee, Appellees

DAVIS, POLK, WARDWELL, GARDINER & REED
Attorneys for Guaranty Trust Co. of N. Y.,
Appellee

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Clerk's Certificate**UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

185

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America, for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 11th day of December, 1945, in the year of our Lord One Thousand Nine Hundred and Forty-Five and the Independence of the United States the One Hundredth and Seventieth.

WILLIAM V. CONNELL
Clerk

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SEAL

[fol. 63] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1945

No. 225

(Argued June 5, 1946 Decided July 3, 1946.)

Docket No. 20121.

SILESIAN-AMERICAN CORPORATION, and SILESIAN HOLDING
COMPANY, Appellants,

v.

JAMES E. MARKHAM, Alien Property Custodian, Appellee
Before: L. Hand, Augustus N. Hand and Clark, Circuit
Judges

Appeal from an order in bankruptcy of the District Court
for the Southern District of New York, answering a peti-
tion for instructions of a debtor in reorganization under
Chapter X of the Bankruptcy Law.

Leonard P. Moore, for the appellants, James L.
Morrisson, for the appellee.

[fol. 64] L. HAND, Circuit Judge:

The Silesian-American Corporation, a debtor in a reor-
ganization under Chapter X of the Bankruptcy Law, ap-
peals from an order of the Bankruptcy Court, answering
its petition for instructions whether to comply with a de-
mand made upon it by the Alien Property Custodian. The
controversy arose over shares in the debtor which stood
in the name of a Swiss corporation, but the certificates of
which were held by certain Swiss banks as pledgees. The
Alien Property Custodian, on November 17, 1942, passed
a "vesting order" by which he "vested" in himself these
shares of stock based upon a finding that, although they
were "owned" by the Swiss corporation, that corporation
"held" them "for the benefit of . . . a German corpo-
ration"; and on this account they were property of "a
national of a designated enemy country." He also deter-
mined "that to the extent that . . . such nationals
are persons not within a designated enemy country the
national interest . . . requires that such persons be

treated as nationals of the aforesaid designated enemy country." The Custodian served this order upon the debtor on January 18, 1943, and on February 12th, made a demand upon it to cancel the shares on the debtor's books, and to issue in lieu thereof new certificates in the name of 'the Alien Property Custodian.' " Not wishing to comply with this order, because it feared that it might not be protected against the registered shareholder, and particularly against the pledgees, the debtor applied to the Bankruptcy Court for instructions. The Swiss banks appeared at the hearing and opposed the demand of the Custodian; they also announced to the debtor their intention of holding it and its trustee personally responsible for any action which either might take to their prejudice. On October 30, 1945, the [fol. 65] judge directed the debtor to cancel the shares upon its books and to issue new certificates in equal amount to the Custodian. The debtor has appealed from this order, but the Swiss banks have not.

The debtor has no interest in the controversy, legally recognizable, except to be protected against any claims by the pledgees, or by the Swiss corporation in whose name the shares are registered. It has no standing vicariously to assert against the claims of third persons, the interests of those who may appear on its books to be its shareholders; and our inquiry may therefore be confined to whether §5(b) (2) of the Trading with the Enemy Act provides protection for the debtor. (In all that we say we mean to leave unanswered the question whether the pledgees were bound by their appearance in the district court.) The difficulties arise from the amendment in 1941 of §5(b) of the Trading with the Enemy Act. Until that time §7(c) was the only provision which gave power to the President to compel the transfer of alien property; and it was limited to property of an enemy or of an ally of an enemy; for, although §5(b) authorized very wide power to investigate, it did not touch transfers. However, the amendment of 1941—in subsection B of subdivision one—gave power to the President not only to investigate "transactions involving any property in which any foreign country, or national thereof has any interest," but to "compel . . . any . . . transfer" of such property; and as the section expressly covered all property "subject to the jurisdiction of the United States," it included shares of stock in a domestic corporation. *Stoehr v. Wallace*, 255 U. S. 239; *Great Northern*

Railway Company v. Sutherland. 273 U. S. 182. The power of Congress to seize and confiscate enemy property rests upon Art. 1, §8, Clause 11 of the Constitution. *Stoehr* [fol. 66] v. *W. Wallace*, *supra*, p. 242; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 11. Whether it exists at international law may be doubted; but nobody contends that the war power of Congress includes the seizure of the property of friendly aliens. The amendment of §5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any "national emergency declared." It can rest upon Art. 1, §8, Clause 1: i.e. upon the power "to provide for the common Defence and general Welfare"; indeed, so far as we can see, the debtor does not challenge the power itself, but its exercise. It complains that "the amendment delegates an unrestricted discretion to the President, and does not provide "just compensation" for seizures.

As to the first, it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through "rules and regulations." The only objection to this which can be raised is that it disturbs the constitutional "separation of powers"; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed, of statement in any other terms than that the interest of the country demands the prescribed action. That is, however, enough. *New York Central Securities Corp. v. United States*, 287 U. S. 12. The separation of the executive from the legislative power is in the end a matter of degree anyway; thousands of decisions are made every day by administrative officers which involve a balance of conflicting interests—the character- [fol. 67] istic field for legislation. That the power to seize property (call it executive or legislative as one will) may be lawfully conferred without attempting to fix the conditions, is proved by several other statutes of long standing and of universal acceptance: as for example, the power to condemn of the Federal Works Administrator (§341 of Title 40), that of any executive department in the District (§361 of

Title 40), and that of the Secretary of War (§171 of Title 50). Indeed, the power conferred upon the President in §7(c) of the Trading with the Enemy Act itself is without condition; and, so far as concerns unconstitutional delegation, it makes no difference that it is limited to enemy property. Nor does it matter that by Executive Order No. 9095 the President in turn delegated his powers to the Custodian, authorizing him to "vest" in himself the property of a friendly alien when he determined that this was "necessary in the national interest." That was in effect the same condition on which the President's own power was conferred; and in the nature of things the President cannot personally exercise the least fraction of the manifold powers of every description which are granted to him—more truly, which are imposed upon him. If he may not depute their exercise, they are as sterile as stones. Whether Executive Order No. 9095 was definite enough to be valid is separate from whether the power was improperly delegated by Congress. That objection is valid only in case the holder of the seized property may be subjected to duties which he cannot ascertain, which is clearly not true, for all seizures are made by orders *ad hoc*, and the duties imposed are clear and explicit.

The next question is whether a friendly alien whose property has been seized may in any way secure "just compensation." Subsection two of §5(b) declares that compliance with any demand of the Custodian shall be a dis-[fol. 68] charge of any "obligation" of the person on whom it is made, and a defence in any court against being held "liable." (We pass without discussion the patently untenable argument that this covers only "obligations" and liabilities to the United States.) This was necessary, in spite of §7(c), because of the enlarged scope of §5(b); and it left the friendly alien without remedy against the person who should make the transfer. Moreover, neither §5(b) nor any other section of the Trading with the Enemy Act gave him any remedy, unless it were §9(a). A friendly alien stands in a position different from either an enemy or a citizen whose property has been seized. A citizen may avail himself of §9(a) to reclaim his property, as much when it has been seized under §5(b) as under §7(c); if he is successful in the suit, he will be restored to possession, for the seizure will be shown to have been unlawful. Such too was the position of a friendly alien under §9(a) in the original Act. An enemy or an ally of an enemy is positively

and intentionally denied relief, not only in §9(a) but elsewhere, because his property may be forfeited; he can rely only upon the grace of Congress. But by hypothesis a friendly alien can not reclaim his property if the seizure has been lawful; and yet he cannot be deprived of it without just compensation, because the Fifth Amendment protects him. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489. Thus, it can be argued with much force that, unless some provision can be found by which he may secure compensation, §5(b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection 2 would be valid. It so chances that both the debtor and the Custodian take the position that a friendly alien may not sue under §9(a). That may be so, for, although he would have formal capacity to sue under that section—not being [fol. 69] an enemy or an ally of an enemy—in order to recover he would have to “establish” some “interest, right or title” in the seized property; yet, if §5(b) is valid, the seizure would be valid, and by the seizure all his “interest, right and title” would have “vested” in the Custodian. However that may be, it is settled by many decisions of which we need only cite the last—*Yearsley v. Ross*, 309 U. S. 18—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is “just compensation” under the Fifth Amendment. *Submarine Signal Co. v. United States*, 61 Ct. Cls. 652, turned altogether on *Deutsche-Australische Dampfschiffs Gesellschaft v. United States*, 59 Ct. Cls. 450, and has no application here. (The debtor appears to argue that the Custodian’s “vesting” order did not intend to cover the interest of the Swiss banks as pledgees, but that is so plainly untrue, that it need not detain us.)

Next the debtor asserts that in any event §8(a) protected the interest of the Swiss banks from seizure. It is true that in the original Act, §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; and, for argument, we will assume that it forbade disturbing the possession of any pledgee who was not himself an enemy or an ally of an enemy. But after the amendment of §5(b) had extended the power to seize all interests of friendly aliens, §8(a) could no longer protect their pledges, once the Custodian found that the interest of the United States demanded their seizure, any more than it protected

the pledges of enemies or allies of enemies. Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure.

[fol. 70] Finally, we find no basis for the argument that the debtor should not be forced to issue new certificates while the Swiss banks hold the old ones, which the Supreme Court answered directly as to §7 (c) in *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182. To meet this the debtor reasons that, because §7(c) specifically provides for the situation, and §5(b) after its amendment does not, Congress must have had a different purpose as to the seizure of the shares of a friendly alien. That is not really credible, for the result would be that, although when the Custodian seized the shares of an enemy or an ally of an enemy, he could get a new certificate and a marketable title, when he seized the shares of a friendly alien, he would have nothing but his right under the "vesting" order, a title which no buyer would accept. Yet §5(b) (1) itself provides that the seized property may be sold. That is the sort of interpretation which sinks the purpose of the statutes in a perverse loyalty to its text. Section 5(b) after its amendment remained a part of the original Act, quite as much as it had been before; of that the mere fact that it was an amendment ought to satisfy any sensible person. Had §7(c) not contained the express provision for new certificates, we should have held without hesitation that such an incidental power was to be implied as part of the main power, both in §7(c) itself and in §5(b). And it would be a travesty of statutory construction to suppose that when Congress extended the scope of §5(b) it meant to make transfers under it ineffective, because it did not incorporate expressly or by reference the ancillary provisions which out of abundant and unnecessary caution it had already incorporated in §7(c).

[fol. 71] The debtor raises other objections; indeed, it raises every conceivable objection; but we have considered all that deserve discussion, and perhaps more. The effort is of a kind which was often tried during the last war, always without success. The power of the United States peremptorily to reduce to its possession and apply to its use, at moments critical in its history, all property which lies within its power is not to be emasculated by the delays of private litigation; the peril may be overwhelming,

the need imperative. It is enough that reparation will be available, where reparation is due; meanwhile the individual must comply with the immediate demand just as he must comply with the immensely more grievous demand for the possible sacrifice of life and limb, when that too is called for.

Order affirmed.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of July, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

In the Matter of Silesian-American Corp., Debtor.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 73] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, In re Silesian-American Corp. Judgment, United States Circuit Court of Appeals—Second Circuit. Filed July 3rd 1946, Alexander M. Bell, Clerk.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

[141.75] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1946

No. 346

ORDER ALLOWING CERTIORARI—February 17, 1947

A petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

It is further ordered that the order entered October 14, 1946, denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted. The case is assigned for argument immediately following No. 934, Clark, Attorney General vs. Uebersee Finanz-Korporation, A. G.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9445)